Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

GARY WAYNE BROCK, Petitioner,

v.

CATERPILLAR, INC.; GREAT WESTERN COAL, INC.;
GREAT WESTERN COAL (KENTUCKY), INC.;
OLD REPUBLIC INSURANCE COMPANY;
ACTING DIRECTOR OF SPECIAL FUND; Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a United States Court of Appeals with diversity jurisdiction violate the Seventh Amendment when it reverses a jury verdict on the basis of, not applicable state law as it exists, but applicable state law as that Court believes it should be; or when it reverses a jury verdict on the basis of an evidentiary error rather than remanding for a new trial?

II. Does *Daubert v. Merrill Dow Pharmaceuticals, Inc.* apply to expert testimony other than scientific testimony based on some unique, untested, or controversial principle or methodology?

III. Does a federal court with diversity jurisdiction, when reviewing a motion for judgment as a matter of law, apply the federal standard or the standard of the state whose substantive law controls?

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. Petitioner has no information of parent or subsidiary companies of any party, pursuant to SCR. 29(6).

This action began with a complaint filed by plaintiff Gary Wayne Brock, against defendant Caterpillar, Inc., alleging that Brock's injuries suffered while operating a Caterpillar D9H bulldozer were the result of the bulldozer's defective design and unreasonable dangerousness. Old Republic Insurance Company, the workers' compensation carrier for Mr. Brock's employer, Nally and Hamilton Enterprises, intervened and asserted a claim for recovery of workers' compensation benefits paid and to be paid to Mr. Brock. Kentucky's Special Fund also intervened and asserted a claim for workers' compensation benefits paid and to be paid to Mr. Brock as a result of a settlement of his workers' compensation claim. Caterpillar, Inc. joined Great Western Coal, Inc. and Great Western Coal (Kentucky), Inc. as third-party defendants, alleging that the accident was caused in part by failure on the part of the third-party defendants to observe routine care and maintenance of the dozer in question. Prior to trial, Great Western Coal (Kentucky), Inc. was dismissed by agreed order, and Great Western Coal, Inc. was dismissed on the basis of post-bankruptcy discharge. The trial court included Brock, Caterpillar, Nally & Hamilton Enterprises,

and Great Western Coal, inc. in the apportionment of fault instruction. The only parties that participated in the Court of Appeals proceeding were Brock and Caterpillar.

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OLD REPUBLIC INSURANCE COMPANY;
ACTING DIRECTOR OF SPECIAL FUND; Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Gary Wayne Brock, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Brock v. Caterpillar, Inc.*, 94 F.3d 220 (6th Cir. 1996) and is reproduced in the appendix filed herewith at App. 1a. The decision of the Court of Appeals which denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc is not published, and is reproduced at App. 17a. The decision of the Kentucky Supreme Court on the certification of question of law is reported at *Caterpillar, Inc. v. Brock*, 915 S.W.2d 751 (Ky. 1996) and is reproduced at App. 19a. The certification of law from the Court of Appeals to the Kentucky Supreme Court is unreported and is reproduced at App. 27a. The unreported opinions of the District Court in this case are reproduced at App. 41a and App. 63a, and App. 65a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on August 26, 1996, and its denial of Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc on October 28, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

On June 20, 1990, Petitioner Gary Brock, age 37, an experienced bulldozer operator, was operating a Caterpillar D9H bulldozer on a steep slope in eastern Kentucky, doing

coal mine reclamation work. The bulldozer suddenly and without warning lost its forward function and freewheeled backward down the hill. Brock was terribly injured. He had worked constantly since age 16, but he has never been able to get over this injury or to return to work.

On June 17, 1991, Brock filed a civil action in Federal District Court, based on diversity jurisdiction pursuant to 28 U.S.C. § 1332. Trial began on September 14, 1993 and was concluded September 16, 1993.

At trial, Petitioner Brock proved that the bulldozer:

(1) Freewheeled because it lost hydraulic oil pressure, so that the transmission would not supply power to the tracks;

(2) Could not do anything but roll if it lost oil pressure on a slope;

(3) Could not be steered if it lost oil pressure;

(4) Could not be stopped if it lost oil pressure on a steep slope, because the same hydraulic oil supplied the transmission, the steering and the hydraulic boost to the brakes.

At trial, Petitioner Brock further proved that Respondent Caterpillar:

(5) Knew that this scenario was completely predictable, and that loss of oil pressure occurred from time

to time, including during operation on steep slopes due to "cavitation" in the oil pump;

(6) Marketed and promoted the bulldozer for steep slope work;

(7) Knew that a spring-applied, hydraulically-released brake would prevent the bulldozer from rolling if it lost oil pressure;

(8) Designed such a system at the same time it designed the bulldozer in question;

(9) Did not implement that better system in the D9H bulldozer;

(10) Put a new system into a prototype in 1973 and into production in other machines by 1978;

(11) Continued making the D9H the same way, and made the D9H model until 1981;

(12) Knew that the other system was not a theoretical design that could be made, but a superior design in production at Caterpillar which Caterpillar chose not to put in the D9H in question in this case that it made in 1978.

The jury found that a reasonable person would not have continued marketing the machine and placed 60% of the fault on Caterpillar. Caterpillar filed its notice of appeal January 4, 1994. The Sixth Circuit Court of Appeals, convinced initially that Caterpillar was wrong, but concerned about apportionment of fault because of Kentucky's products liability statute at KRS 411.320(1), which provides that the maker of a machine is not liable if routine maintenance and care has not been provided, ruled that whether Kentucky's

products liability statute was overruled by Kentucky's apportionment statute at KRS 411.182(1), which mandates apportionment of fault in all cases, was "dispositive" of the cause, and on May 10, 1995 certified that question to the Kentucky Supreme Court.

On February 22, 1996, Kentucky's Supreme Court certified the law, and ruled that the apportionment statute did overrule the products liability statute, as had been held by the trial court, thus upholding the trial court's determination to submit the question of apportionment of fault to the jury.

On August 26, 1996, the Sixth Circuit, in a reversal of its prior order, decided that whether apportionment was correctly submitted to the jury was not dispositive of the case, and further decided that Respondent Caterpillar was free to ignore safer designs being developed on its own drawing boards, by its own engineers, being made on its own production lines, being sold by its own dealers, and that Caterpillar was free to continue to make and market a machine Caterpillar knew and admitted knowing could and would lose oil pressure, free-wheel down hill when it did lose oil pressure, and have no steering and no brakes when that happened, even though Caterpillar had a better design in production in its own plant.

On October 28, 1996, the Sixth Circuit Court of Appeals denied Petitioner Brock's Petition for Rehearing and

Suggestion for Rehearing En Banc. Petitioner Brock now files this Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISION INVOLVED

The pertinent provision of the United States Constitution, the Seventh Amendment, is set forth below:

> In Suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to resolve a split between the federal circuit courts of appeals on two important questions, and to settle an important question of federal law that has not been, but should be, settled by this Court.

First, this Court should settle an important question of federal law: whether a United States Court of Appeals violates the Seventh Amendment of the United States Constitution when it reverses a jury verdict based, not applicable state law as it exists, but on state law as the court of appeals believes it should exist; or when it reverses a jury

verdict for evidentiary rulings, rather than remanding for a new trial. In the instant case, the Sixth Circuit Court of Appeals reversed a jury award to Petitioner Brock based, not on Kentucky's law as it exists, but on Kentucky law as the Court of Appeals believes it should exist. Such action by a court of appeals sitting in diversity jurisdiction violates the "re-examination" clause of the Seventh Amendment, as it is well settled that federal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights, but it does not carry with it generation of rules of substantive law. *Erie R.R. v. Thompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938). Further, when a reviewing court reverses for evidentiary errors, rather than remanding for a new trial, it violates the re-examination clause of the Seventh Amendment.

Second, this Court should grant the writ in order to resolve a split between the federal circuit courts of appeals concerning the application of the teachings on the expert opinion testimony found in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993). In the instant case, the Sixth Circuit Court of Appeals held that Petitioner Brock's expert's testimony was inadmissible, based in part of this Court's holding in *Daubert*. Brock's expert's opinion was based solely on his experience or training, and the expert did not rely on some scientifically unique, untested, or controversial principle or methodology. However, the Tenth Circuit Court of Appeals in *Compton v. Subaru of Am., Inc.* 82 F.3d. 1513 (10th Cir. 1996), held that *Daubert* applied only when the proffered expert relied on

some scientifically unique, untested, or controversial principle or methodology, and not when the testimony was based solely on the expert's experience or training.

Third, this Court should grant the writ in order to resolve a split between the federal circuit courts of appeals concerning the standard for reviewing a motion for judgment as a matter of law. The Sixth Circuit Court of Appeals follows the minority view that the applicable state's standard is to be followed. The majority view is to apply the federal standard. In the instant case, the Sixth Circuit Court of Appeals, in applying Kentucky's standard, did not consider all of the evidence adduced at trial, but only the evidence presented by the plaintiff, Petitioner Brock.

I.

A UNITED STATES COURT OF APPEALS WITH DIVERSITY JURISDICTION VIOLATES THE SEVENTH AMENDMENT WHEN (1) IT REVERSES A JURY VERDICT ON THE BASIS OF, NOT THE STATE'S SUBSTANTIVE LAW AS IT IS, BUT THE STATE'S SUBSTANTIVE LAW AS THE COURT BELIEVES IT SHOULD BE; AND (2) IT REVERSES A JURY VERDICT FOR EVIDENTIARY RULINGS, RATHER THAN REMANDING FOR A NEW TRIAL.

1.

It is well settled that, in diversity cases, federal courts must apply the applicable state law. *Erie R.R. v. Thompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938). Therefore, in the instant case, the Court of Appeals correctly looked to the substantive law of Kentucky to determine whether evidence of subsequent remedial measures was properly admitted. However, rather than following the substantive law of Kentucky, the Court of Appeals did not apply the law as it existed, but applied the law as the Court of Appeals believed it should be. After applying Kentucky's law as the Court believed it should be, the Court of Appeals reversed the jury verdict in favor of Petitioner Brock. Such action violated the Seventh Amendment's "re-examination" clause which provides that:

> In Suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and **no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.** (Emphasis added.)

In the instant case, Petitioner Brock, in order to show that the bulldozer in question was defective, introduced evidence through his expert and others of subsequent remedial measures taken by Respondent Caterpillar in designing later model bulldozers. Respondent Caterpillar also introduced

evidence, through its experts and others, concerning those remedial measures.

In Kentucky, evidence of subsequent remedial measures in products liability cases is admissible, pursuant to *Ford Motor Company v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991). In *Fulkerson,* in commenting on the type of evidence a plaintiff would have to introduce in a products liability case, the Kentucky Supreme Court stated:

> In a products liability case, the plaintiff must usually show that there was a defect in the way in which a product was designed or manufactured. Except where the defect is obvious . . ., **the plaintiff must usually show that some alternative way of manufacture or design was both safer and feasible. A subsequent improvement is highly probative on both these points.** (Emphasis added.)

The Kentucky Supreme Court went on to hold that, as a general principle, evidence of design changes should be admissible where relevant in products liability cases. In the instant case at trial, the trial court specifically relied on *Fulkerson* in admitting evidence of the design of a better braking system in Respondent Caterpillar's D9L dozer, which was manufactured some three years after the D9H dozer in question and was the successor model to the D9H. Additionally, the trial court specifically relied on *Fulkerson*

in admitting evidence of the better braking system in the D10 model bulldozer, which was being designed at the same time that the D9H dozer in question was manufactured. Thus, the trial court properly followed the dictates of *Erie*, in applying the applicable state substantive law.

On appeal, the Sixth Circuit Court of Appeals reversed the decision of the trial court on the basis that the subsequent remedial measures evidence was improperly admitted. In so holding, the Court of Appeals did not apply Kentucky law as it exists, but applied Kentucky law as it believed should exist. The Court of Appeals reversed the jury verdict in favor of Petitioner Brock in a way not according to the rules of common law, i.e., by applying substantive state law as it believed the law should be.

As the Court of Appeals re-examined a jury verdict in the instant case in a fashion contrary to common law, that being contrary to the dictates of *Erie,* the action of the Court of Appeals in reversing the jury verdict violates the Seventh Amendment to the United States Constitution.

2.

The Court of Appeals also violated the Seventh Amendment when it reversed a jury verdict in favor of Petitioner Brock rather than remanding for a new trial, based on evidentiary rulings. If a trial court has improperly admitted evidence and a substantial right of a party has been

affected, a new trial may be ordered. FRCP 59, 61; *Logan v. Dayton Hudson Company*, 865 F.2d 789, 790 (6th Cir. 1989); *See* 6A Moores Federal Practice, paragraph 59.08[5] (collected cases). In the instant case, the Sixth Circuit Court of Appeals, rather than remanding for a new trial, reversed the jury verdict in favor of Petitioner Brock, and thus violated Brock's Seventh Amendment rights.

II.

DAUBERT APPLIES ONLY TO SCIENTIFIC EXPERT TESTIMONY WHICH RELIES ON SOME UNIQUE, UNTESTED, OR CONTROVERSIAL PRINCIPLE OR METHODOLOGY.

In the instant case, the Court of Appeals relied on *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113, S.Ct. 2786 (1993) in holding that the trial court erred in allowing Petitioner Brock's expert to testify as to subsequent remedial measures taken by Caterpillar concerning braking systems on bulldozers. *Brock*, 94 F.3d at 225. The Court of Appeals went on to hold that, as Petitioner Brock's expert's testimony was admitted in error, that the evidence that was properly admitted was insufficient to support the verdict, and therefore the verdict was reversed. Petitioner Brock's expert's testimony was based on his experience and training, and thus did not fall under the purview of *Daubert*. As noted by the Tenth Circuit in *Compton v. Subaru of Am., Inc.*, 82 F.3d 1513 (10th Cir. 1996), *Daubert* applies only with the

with the proffered expert relies on some scientifically unique, untested, or controversial principle or methodology, not when the testimony is based solely on the expert's experience or training. However, in the instant case, the Court of Appeals relied on *Daubert* to exclude Petitioner Brock's expert's testimony, even though the testimony was based on the expert's technical training and experience, not on a unique, untested or controversial principle or methodology.

Accordingly, as there is a split in the United States Courts of Appeals concerning the application of *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786 (1993), this Court should resolve the issue, making it clear that *Daubert* only applies to scientific testimony based on some unique, untested, or controversial principle or methodology.

III.

THE PROPER STANDARD FOR REVIEWING MOTIONS FOR JUDGMENT AS A MATTER OF LAW IS THE FEDERAL *BRADY* STANDARD.

In *Brady v. Southern Railroad*, 320 U.S. 476, 64 S.Ct. 232 (1943), the Supreme Court announced the standard for reviewing a motion for judgment as a matter of law as follows:

> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial, the result is saved from the mischance of speculation over legally unfounded claims. *Brady*, 320 U.S. at 479-480.

Since *Brady*, although they have used many different formulations, the federal courts that have used the Brady rule have been reasonably consistent, that a motion under Rule 50(a) may properly be granted when, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict. *See* 5A Moore's Federal Practice, paragraph 50.02[1](collecting cases).

The Sixth Circuit Court of Appeals, however, does not use the federal standard, but looks to the law of the state. *J.C. Wyckoff and Associates v. Standard Fire Insurance Company*, 936 F.2d 1474, 1482 (6th Cir. 1991); *Fitzgerald v. Great Central Insurance Company*, 842 F.2d 157, 159 (6th

Cir. 1988); *Lewis Refrigeration Company v. Sawyer Fruit, Vegetable and Cold Storage Company*, 709 F.2d 427, 430 n. 3 (6th Cir. 1983).

In the instant case, the Sixth Circuit Court of Appeals, in applying the above Kentucky standard, considered only the evidence adduced by the Plaintiff's expert, and did not consider evidence adduced on cross-examination. This procedure, contrary to the federal standard, *Peterson v. Hager*, 724 F.2d 851 (10th Cir. 1984); *Auto Transport, Inc. v. Potter*, 197 F.2d 907 (8th Cir. 1952), results in uneven application of appellate review by federal courts in the different federal circuits. This Court should adopt a federal standard for review of motions for judgment as a matter of law to resolve the different standards of review between the circuits.

CONCLUSION

For all of the foregoing reasons, Petitioner Brock prays this Court grant his Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24
ELECTRONIC CITATION: 1996 FED App. 0277P (6th Cir.)
File Name: 96aO277p.06
Nos. 94-5077/5078

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY W. BROCK, PLAINTIFF-APPELLEE, CROSS-APPELLANT,

v.

CATERPILLAR, INC. DEFENDANT-APPELLANT CROSS-APPELLEE

ROBERT WHITTAKER and
OLD REPUBLIC INSURANCE
COMPANY, INTERVENORS-APPELLEES

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

Decided and Filed August 26, 1996

Before: MERRITT, Chief Judge; KEITH and WELLFORD, Circuit Judges.

WELLFORD, J., delivered the opinion of the court, in which MERRITT, C. J., joined. KEITH, J. (pp. 13-14), delivered a separate opinion concurring in part and dissenting

in part.

HARRY W. WELLFORD, Circuit Judge. Plaintiff, Gary Wayne Brock, was a long-time bulldozer operator for Nally & Hamilton ("N&H"), a reclamation company doing work in coal mining areas in mountainous Harlan County, Kentucky. In June of 1990, Brock began work on a "high wall" where strip mining had taken place.[1] Brock normally operated a Caterpillar model DSL bulldozer, but on one particular day, N&H assigned him to a larger model D9H, which was also manufactured by defendant Caterpillar, Inc. ("Caterpillar"). Great Western Coal Company ("Great Western") owned the bulldozer, but N&H had borrowed it because it was already at the work site. Brock conceded in his testimony that he had never before operated a model D9H Caterpillar bulldozer.

Brock testified that he first checked the bulldozer's fluid levels before commencing work.[2] In order to reach the top of the fill, Brock was required to push dirt up an access road near the top of the mountain. The slope was approximately a two-to-one grade, an angle of about twenty-seven degrees. As Brock proceeded up the access road, he testified that the bulldozer suddenly lost "its prime" or its hydraulic fluid pressure, which caused the bulldozer to lose its braking power on this slope. Brock attempted to slow the precipitate backward fall by dragging the bulldozer's blade

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[1]A "high wall" is the vertical wall that remains on a mountain slope after coal has been stripped away. At the site in question, the fill had slipped at the top of the high wall and it was plaintiff's job to push the dirt back to the top.

[2]Caterpillar contends that an inspection subsequent to the accident indicated that the fluid levels were full, but not overfilled, as recommended in Caterpillar's sales literature.

unsuccessfully and attempting manually to apply the brakes. As the bulldozer spun out of control, it left the access road, twisted sideways, and tumbled down the reclaimed high wall, throwing Brock from the cab of the vehicle. The D9H continued its fall, eventually coming to rest with the engine still running. After the accident, N&H employees retrieved the bulldozer and found it to be functioning normally. They drove the D9H back up the same access road, and this bulldozer continued in operation for several years to the date of trial.

In the accident, Brock suffered injuries to his cervical spine, ankle, lower back, and his psyche. He had an operation on his ankle and another has been recommended with respect to claimed ongoing neck problems. As a result of the accident, physicians have recommended that Brock seek counseling and psychiatric care for the depression he has allegedly experienced subsequent to the accident. He has not, since the accident, operated a bulldozer.

In June, 1991, Brock, a resident of Kentucky, brought a timely diversity action against Caterpillar only, alleging that Caterpillar defectively designed the D9H bulldozer and that the defective design made it unreasonably dangerous and was the proximate cause of his injuries.[3] Brock alleged that in 1978, around the time that this D9H was manufactured and sold, Caterpillar had designed a safer braking system for bulldozers which caused disc brakes to be applied automatically whenever hydraulic pressure was lost. That improved system was not ever used in this model D9H. Rather, Caterpillar elected to manufacture the D9H with a

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[3]The parties agreed to trial of the case by Magistrate Judge James F. Cook.

"hydraulic boosted" or "band" braking system, which the bulldozer operator applies manually through means of a brake pedal, despite this claimed availability or technical knowledge of particular safer braking mechanism. The "hydraulic boosted" system supplied the extra hydraulic power under normal operating conditions, and served as a supplementary source of power for the brakes on the model D9H.

Brock contended that the D9H "cativated"[4] as he moved up the steep incline and that the resulting loss of hydraulic pressure caused his brakes to fail. Brock further maintained that if Caterpillar had manufactured the D9H with the safer disc braking system, which applies the brakes automatically upon the loss of hydraulic pressure, then the bulldozer would not have "free wheeled" down the high wall.

After Brock filed his complaint, Old Republic Insurance Company ("Old Republic"), the worker's compensation carrier for N&H, intervened, asserting a claim for recovery of medical expenses and other benefits already dispersed to Brock. The trustee for the worker's compensation Special Fund also intervened as a plaintiff, seeking the recovery of any benefits paid. Caterpillar brought a third-party claim against Great Western, claiming that if the accident occurred as Brock alleged, Great Western was responsible because it failed to observe routine care and maintenance of the bulldozer. Great Western, however, was dismissed on the basis of its post-bankruptcy discharge and stay. The parties

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[4]Cativation is a term used to describe the drawing away of fluid from the intake valve to the hydraulic pump. This condition causes air to be pumped through the engine instead of oil or fluid. Cativation can result in the loss of hydraulic pressure when a bulldozer is operating on a steep slope. Caterpillar's manual recommended overfilling the bulldozer with hydraulic fluid to prevent cativation.

agreed that, should the evidence warrant, Great Western might be included in the jury apportionment of any fault or liability.[5] The two intervening plaintiffs did not actively participate in the trial nor are they participating in this appeal.

Prior to trial, Caterpillar moved to exclude evidence concerning the differences between the braking systems on the D9H and later model bulldozers, the D9L and the much larger D10. Caterpillar argued that the models were so dissimilar that evidence regarding any comparison would be overly prejudicial and misleading to the jury. The magistrate judge denied defendant's motion *in limine, and* the case proceeded to a jury trial.

The jury returned a verdict in favor of Brock, apportioning fault as follows: Caterpillar 60%, Great Western 20%, N&H 15%, and Brock 5%. The jury awarded Brock a total of $950,000.00, apportioned as follows: $20,000.00 for past medical expenses, $50,000.00 for future medical expenses, $100,000.00 for lost earnings, $630,000.00 for permanent impairment of Brock's future earning capacity, $100,000.00 for past physical and mental suffering, and $50,000.00 for future mental suffering. Caterpillar moved for judgment as a matter of law or, in the alternative, for a new trial, arguing that there was no proper and relevant evidence from which a reasonable juror could find that Caterpillar defectively designed the D9H in question. The magistrate judge denied that motion. Caterpillar appeals that denial, and Brock cross-appeals the magistrate judge's holding that there was insufficient evidence to support the jury's award of damages for future medical expenses.

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[5]The magistrate judge also supported N&H, Brock's employer, to be included in the jury's apportionment of fault.

We address first Caterpillar's argument that, because the jury found that Great Western failed "to observe routine care and maintenance" of the DgH, it was entitled to a judgment as a matter of law pursuant to KY. REV. STAT. ANN. § 411.320(1). Brock argues that Kentucky's Comparative Fault Act, codified at KY. REV. STAT. ANN. § 411. 182, repealed § 411.320(1) by implication. Because Kentucky has a substantial interest in the resolution of that question, we certified the following issue to the Kentucky Supreme Court in May of 1995:

> Did Ky. Rev. Stat. Ann. § 411.182(1) negate and/or overrule Ky. Rev. Stat. Ann. § 411.320(1)?

In response, the court unequivocally pronounced that "KRS 411. 182(1) has repealed KRS 411.320(1)." Therefore, we have no choice but to reject Caterpillar's argument that § 411.320(1) provides it a complete defense in this action. Nevertheless, we find in favor of Caterpillar for the reasons that follow.

As is stated above, the tractor involved in Brock's accident was a model D9H bulldozer, which was manufactured by Caterpillar and sold by its dealer some twelve years before the 1990 accident that brought about Brock's injury. Apparently, this bulldozer had been utilized for many years without any problems of the nature asserted by Brock. Brock alleged, among other things, that Caterpillar "did test the vehicle for safety," but that "it was defectively designed [and] unreasonably dangerous." Caterpillar's principal defense was that, as a matter of law, plaintiff failed to produce sufficient admissible evidence to show that the bulldozer's braking system was defective due to its design or

that it was unreasonably dangerous.[6]

In establishing a defect in product design, a plaintiff must show something more than that it was "theoretically probable that a different design would have been feasible." *Ingersoll-Rand Co. v. Rice,* 775 S.W.2d 924,928 (Ky. Ct. App. 1988). Under applicable Kentucky law in this diversity case, plaintiff must also demonstrate "more than that a particular injury would not have occurred had the product which caused the injury been designed differently." *Jones v. Hutchinson Mfg., Inc.,* 502 S.W.2d 66, 70 (Ky. 1973) (quoting 63 Am. Jur. 2d *Products Liability* § 73, p. 79); *Rice,* 775 S.W.2d at 928-29 (citing *Jones,* 502 S.W.2d at 70). Another court, interpreting Kentucky law on this subject, stated that "proof that technology existed, which if implemented would feasibly have avoided a dangerous condition, does not alone establish a defect." *Sexton v. Bell Helmets, Inc.,* 926 F.2d 331, 336 (4th Cir.), *cert. denied,* 502 U.S. 820 (1991).

Like many other state courts, Kentucky courts have encountered difficulty. with the meaning of the strict liability concept, defective condition unreasonably dangerous." Indeed, in *Montgomery Elevator Co. v. McCullough,* 676 S.W.2d 776, 780 (Ky. 1984), the court stated that for fifteen years "we struggled with the meaning of these words." *McCullough*

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[6]The only part of the bulldozer alleged to be defective at trial was the braking mechanism. However, Brock also alleged that "use of coal company employees ... was foreseeable and would likely result in severe injury." He also averred that "[i]t was feasible and practical" at the time of manufacture to design the bulldozer so that it was safe for users. The problems specified were "inherent instability and handling difficulties . . . [and] propensity to go out of gear." Thus, the bulldozer was alleged to be violative of the condition required under the Kentucky Products Liability Act.

pointed to *Nichols v. Union Underwear Co.*, 602 S.W.2d 429 (Ky. 1980), in interpreting § 402A of the RESTATEMENT (SECOND) OF TORTS, which had been adopted in Kentucky:

> [T]he question is whether the product creates "such a risk" of an accident of the general nature of the one in question "that an ordinarily prudent company engaged in the manufacture" of such a product "would not have put it on the market."

McCullough, 676 S.W.2d at 780 (citing *Nichols, 602* S.W.2d at 433).

The *McCu!lough* court pointed out pertinent considerations in these products liability cases to take into account: (1) "feasibility of making a safer product," (2) "patency of the danger," (3) "warnings and instructions," (4) "subsequent maintenance and repair," (5) "misuse," and (6) "inherently unsafe characteristics." *ld.* The *McCullough* court held that evidence of product failures of "substantial similarity" was "relevant and admissible." *Id.* at 783. Likewise, evidence of a lack of substantially similar instances of malfunction would be admissible for certain purposes. *See Harris v. Thompson,* 497 S.W.2d 422, 429 (Ky. 1973) ("Evidence of the occurrence or nonoccurrence of other accidents or injuries under substantially similar circumstances is admissible when relevant to certain limited issues . . . ."). The magistrate judge permitted Brock's expert, William M. Cooper, to testify about the feasibility of using the improved brake system in the D9H used by Brock. The question on this appeal, then, becomes whether the admission of the "comparison" evidence regarding the use of another braking

system by Caterpillar on a different model was relevant and proper, and whether Cooper's opinion, thus, was properly admitted.

The evidence showed that Caterpillar made the model D9H bulldozer from 1974 to 1981, and produced almost 10,000 of such machines, which weighed about 47 tons, with "band type" brakes on each side, boosted by a hydraulic system. Cooper testified as follows:

> Q. Do you have an opinion, sir, as to what effect if any the design of this bulldozer had on this accident?
>
> A. Yes, if the machine. had had a *fail-safe* brake system, such as the newer style tractor did, the D 10 in '78 and the newer styled D 9's did in I think '80 or '81, and therefore, if the machine had lost pressure it would have locked up and Mr. Brock wouldn't have gone down the hill.

(emphasis added). Cooper's testimony that the D9H was defective and unreasonably dangerous was based upon a comparison with the D9H brake system and that incorporated in the newer and larger model D10.[7] In addition, he was allowed to base his opinion, improperly we think, on

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[7]Caterpillar began manufacturing a 90 *ton* bulldozer, the model D10, in 1978. It is conceded that the model D10 was the first one to utilize the new brake system during 1978. There is no question but that the D9H was in its design stages some years before the newer, different system was first offered in the different, much larger, model D10 by Caterpillar.

Caterpillar's incorporation of the new and different disc type brake system, coupled with a new locking feature, in D9 models *two or three years later*. Cooper, was of the view that the machine lost hydraulic pressure causing a loss of boost to the brakes, but he could not indicate the reason for such failure. He admitted that inspection and testing of the machine after the accident revealed no physical evidence of loss of hydraulic pressure. Great Western, the owner of the equipment at that time, inspected the bulldozer and found nothing essentially wrong with the machine's mechanism. In fact, with minor repairs, the machine was used without adverse consequences for three years after the accident.

The model D9H in dispute had already been manufactured for some years before the new system was first incorporated in the concededly much heavier, much more powerful higher capacity model D10. We find no direct evidence that the equipment operated by Brock, particularly its brake system, was inherently dangerous. Cooper himself, familiar with these bulldozers, stated that he had previously considered them to be reasonably safe "at the time." Moreover, even by 1980, Cooper "had no idea that there was anything else available." In 1978, the D9H was concededly not "in violation of any applicable industry standards." There was no evidence that any competitor of comparable machines in 1978 produced them with disc type or so-called "fail safe" brakes.[8] Cooper had never worked in design of bulldozer equipment, and he worked in a family owned coal company which utilized similar Caterpillar D9 equipment. Cooper was familiar with D9H operating instructions which warned about services and maintaining for oil pressure if a bulldozer were

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[8]Only Cooper described the new system, made for the much heavier D10 equipment, to be "fail safe."

operating on steeper slopes with recommendation of a three and half gallon overfill. Brock testified that his oil level "was a little over full," and he checked for leaks before driving this bulldozer for the first time.

There were a large number of changes in character, size, style, and technological advancement between the manufacture design of the D9H in the early 1970's and that of the D10 some years later. We are persuaded that the magistrate judge erroneously permitted Brock's expert to compare these two models and their braking systems in concluding that the earlier D9H model at issue was defectively designed and unreasonably dangerous. It was analogous, in our view, to allowing a plaintiff's expert to compare unfavorably the braking system on a 1974 Chevrolet made by General Motors with that company's 1978 Cadillac automobile. We, therefore, conclude that the magistrate judge committed prejudicial error in allowing this analogy to be drawn by plaintiffs expert as proof of defective and unreasonable dangerous design.

Nor, are we persuaded by *Ford Motor Co. v. Fulkerson,* 812 S.W.2d 119 (Ky. 1991), to the contrary. A divided court in that case held that evidence of a change in the *same model* Ford vehicle from the year 1984 to 1985 was admissible in a design defect case, holding, however, that the trial judge retained "power to consider whether evidence of little probative value 'may be more prejudicial than it would be helpful.'" *Id.* at 126.[9] Under the circumstances of the instant case, we are satisfied that plaintiff's proof of later

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[9]In that case, "Ford did not undertake to confront plaintiff's expert on the feasibility of additional retention features" (on the 1984 spindle design). *Id* at 126.

changes in another model should have been considered in the light of Fed. R. Evid. 403(b). In our view, although this "comparison" evidence may be tenuously relevant, such relevance is outweighed by the prejudicial effect in this case because of the dissimilarities in the bulldozers that were the subject of the comparison. [10]

Furthermore, Cooper conceded that he could not tell what caused the loss of hydraulic pressure to the brakes in question, and he could not attribute this situation to a design defect. He also conceded that with regard to oil pressure, the bulldozer is designed "so that the brakes are taken care of first." (There was no evidence of malfunction of the priority valve.) At the time of the accident, moreover, Cooper considered this model Caterpillar used by Brock to be a "reasonably safe machine." After the accident, it is not denied that everything about the tractor was "normal," and it was driven back up the same, or a steeper, incline. Smaller Caterpillar tractors had no brake boosting system comparable to the D9H in question.

In short, Cooper was qualified to testify, and did testify, about matters pertinent to the condition and design of the braking system on the D9H machine at the pertinent time. We find error, however, in allowing him to testify as to the comparison between Caterpillar bulldozers that were substantially different or marketed and sold at a considerably later time. It was noted in *Daubert v. Merrill Dow*

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[10]The D9H bulldozer had a six cylinder engine; the D10 bulldozer had a twelve cylinder engine. Caterpillar's engineer, Buie, testified that there was "no way physically to put the D10 braking system into the D9H tractor." The new D9L model made in 1981 weighed more than 57-1/2 tons (more than 20% heavier that the D9H model).

Pharmaceuticals, 509 U.S. 579, 113 S. Ct. 2786 (1993), that "[e]xpert evidence can be both powerful and quite misleading . . . Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." *Daubert,* 113 S. Ct. at 2798 (quoting Weinstein, 138 F.R.D., at 362). *Daubert* also pointed to an earlier case from this circuit "holding that scientific evidence *that provided formation for expert testimony* viewed in the light most favorable to plaintiffs, was not sufficient" to let the jury decide causation by the alleged defective product. *Id.* (citing *Turpin v. Merrill Dow,* 959 F.2d 1349 (6th Cir.), *cert. denied,* 506 U.S. 826 (1992) (emphasis added)). In the instant case, relevant and admissible evidence was insufficient to establish a defective product. In the alternative, in light of defendant's objections to admission of such testimony, the magistrate judge should have ruled it inadmissible under Fed. R. Evid. 403.

Other than this comparison proof presented by Cooper, which we have deemed inadmissible, plaintiff has failed to demonstrate a design defect under applicable Kentucky law.[11] Accordingly, we must **REVERSE** the verdict for the plaintiff for insufficient proof of a brake system design defect on the bulldozer involved in this unfortunate accident.[12]

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[11]Under all of these circumstances, the jury's allocation of sixty percent of the damages in this case to defendant Caterpillar was simply without reasonable basis. Even if we had found the evidence to be sufficient to find defendant's brake design to be a contributory factor to Brock's injury, we would have remanded the case for a reallocation of fault, including that attributable to plaintiff Brock.

[12]In light of this holding, we need not address Brock's argument that he is entitled to damages for future medical expenses.

For the reasons indicated, we **REVERSE** the judgment for the plaintiff.

KEITH, Circuit Judge, concurring in part and dissenting in part. I concur in the first part of the majority's opinion, namely, that KRS § 411.320(1) does not provide Caterpillar a complete defense to this action. However, with regard to the second portion of the majority's opinion, dealing with Caterpillar's alleged defective design, I must respectfully dissent. I would find that there was sufficient evidence produced at trial to support the jury's verdict.

A district court's denial of a motion for a new trial is reviewed by this Court for an abuse of discretion. *Holmes v. City of Massillon,* 78 F.3d 1041, 1045 (6th Cir. 1996). In addition, this Circuit has held that "[c]ourts are not free to set aside jury verdicts 'simply because different inferences and conclusions could have been drawn or because other results are more reasonable.'" *Brooks v. Toyotomi Co., Ltd.,* 86 F.3d 582, 589 (6th Cir. 1996)(quoting J.C. *Wyckoff & Assoc. v. Standard Fire Insurance Co.,* 936 F.2d 1474, 1487 (6th Cir. 1991)). It is the duty of the jury to weigh the evidence and make credibility judgments. *Morales v. American Honda Motor Co.,* 71 F.3d 531,535 (6th Cir. 1995)(citation omitted). Thus, a jury's verdict should not be disturbed, as being against the weight of the evidence, unless it was unreasonable. *Holmes,* 78 F.3d at 1047.

The majority's opinion focuses solely on the testimony provided by Mike Cooper ("Cooper"), Brock's expert witness, to support its position that the evidence was insufficient to support the jury finding that the D9H was defectively designed. Unfortunately, the majority fails to recognize and credit witness testimony suggesting that the D9H was known

to experience cavitation problems that could have been corrected. Roger I. Buie ("Buie"), a Caterpillar design control engineer, and Cooper testified that the fail-safe braking system used in the D10 was in design development at the same time the D9H was in design development. Cooper testified.. that, with some different engineering, the fail-safe breaking system could have been implemented in the D9H and that had the D9H been equipped with the fail-safe break system the bulldozer would not have ran out of control down the hill. Joseph H. Greir ("Greir"), a 36 year employee at Caterpillar, admitted that the company was aware of the cavitation problems experienced by the D9H. Indeed, the D9H's service magazine explicitly states that the bulldozer may at times cavitate. In short, sufficient evidence was presented at trial for a reasonable juror to conclude that the D9H suffered cavitation problems, Caterpillar knew of these problems, and could have prevented them by using a fail-safe breaking system.

The jury apportioned liability as follows: Caterpillar to be 60% at fault, Great Western Coal to be 20% at fault, Nally & Hamilton to be 15% at fault and Brock to be 5% at fault. The jury went on to award Brock $20,000 for past medical expenses, $50,000 for future medical expenses, $100,000 for lost wages and income, $630,000 for permanent impairment of his power to earn in the future, $100,000 for past physical and mental suffering and $50,000 for future physical and mental suffering for a total of $950,000[1] in damages. It is obvious from the above apportionment of liability and damages, that the jury painstakingly evaluated and considered every aspect of this case before rendering its verdict.

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[1]The district court reduced the award for past medical expenses from $20,000 to $19,021.59.

Although it may have been difficult for Caterpillar to implement the fail-safe break system in the D9H, the jury obviously believed, and the evidence based on Cooper's testimony supports a finding that such an alteration was possible. It is not the job of this Court to substitute our view of the evidence for that of the jury when there is ample evidence to support the jury's verdict. In my view, based on the abundance of evidence produced at trial, the district court's denial of Caterpillar's motion for a new trial was not an abuse of discretion and should be affirmed. Thus, I respectfully dissent.

Nos. 94-5077/5078

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY W. BROCK,	)
	)
Plaintiff-Appellee/Cross-Appellant	)
	)
v.	)
	)
CATERPILLAR, INC.,	)
	)ORDER
Defendant-Appellant/Cross-Appellee,	)
	)
ROBERT WHITTAKER AND OLD REPUBLIC INSURANCE COMPANY,	)
	)
Intervenors-Appellees,	)

BEFORE: KEITH, MERRITT, and WELLFORD, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Judge Keith would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green,
Leonard Green, Clerk

RENDERED: FEBRUARY 22, 1996
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

95-SC-426-CL

CATERPILLAR, INC. APPELLANT

ON REQUEST FOR CERTIFICATION OF THE LAW
FROM UNITED STATES COURT OF APPEALS
V. FOR THE SIXTH CIRCUIT
NO. 94-5077/78

GARY W. BROCK APPELLEE

CERTIFICATION OF THE LAW
BY JUSTICE REYNOLDS

The United States Court of Appeals for the Sixth Circuit has requested certification of the law as to the following question:

> DID KENTUCKY REVISED STATUTE 411.182(1) NEGATE AND/OR OVERRULE KENTUCKY REVISED STATUTE 411.321(1)?

We hold the question which has been certified is answered in the affirmative. KRS 411.182(1) negated KRS 411.320(1).

The basis of the challenge arises from the following statement of facts and nature of the case.

Brock is a long-time bulldozer operator for Nally & Hamilton ("N&H"), a reclamation company doing work in coal mining areas in mountainous Harlan County, Kentucky. In June of 1990, plaintiff began work on a "high wall" where strip mining had taken place. Brock normally operated a Caterpillar model D8L bulldozer, but on this particular day, N&H assigned him a model D9H, which Caterpillar also manufactured in 1978. While Great Western Coal Company ("Great Western") owned this particular bulldozer, N&H borrowed it on the day in question because it was already located at the work site. In order to reach the top of the fill, Brock had to push dirt up an access road near the top of the mountain. The slope was approximately a two-to-one grade, an angle of about 27 degrees. Brock testified that as he proceeded up the access road the bulldozer suddenly lost its prime or hydraulic fluid pressure, which caused the bulldozer to lose its breaking power on this slope. Brock attempted to slow the bulldozer's precipitate backward fall by dragging its blade and manually applying the brakes. As the bulldozer spun out of control, it left the access road, twisted sideways, and tumbled down the reclaimed high wall, throwing Brock from the cab of the vehicle. Brock allegedly suffered various physical and mental injuries.

In 1991, Brock, a citizen of Kentucky, brought a timely diversity action against Caterpillar, an Illinois corporation, alleging that Caterpillar defectively designed the braking system on the D9H bulldozer and that the defective design made the produce unreasonably dangerous. Brock further alleged that the defective design was the proximate cause of his injuries. After Brock filed his complaint, Old Republic Insurance Company ("Old Republic"), the workers' compensation carrier for N&H, intervened as a plaintiff, asserting a claim for recovery of the cost of medical attention

and other benefits already dispersed to Brock. The Trustee for the workers' compensation Special Fund also intervened as a plaintiff, seeking the recovery of any benefits paid to Brock. The two intervening plaintiffs did not actively participate in the trial nor are they participating in this appeal. In addition, Caterpillar brought a third-party claim against Great Western, claiming that, if the accident occurred as Brock alleged, Great Western was responsible because it failed to observe routine care and maintenance of the bulldozer. The magistrate judge dismissed Great Western on the basis of its postbankruptcy discharge and stay. The parties agreed, however, that should the evidence warrant, Great Western would be inclined in the jury's apportionment of fault.

Before trial, Caterpillar requested an instruction from the court advising the jury that if it found that any other party performed an unauthorized alteration or modification of the D9H, it must return a verdict for Caterpillar. Furthermore, Caterpillar asked the magistrate judge to instruct the jury that an unauthorized alteration or modification includes the failure of the owner or operator to observe routine maintenance and care. The magistrate judge, however, declined to give Caterpillar's proffered instructions. He found that there was insufficient evidence for the jury to conclude that Great Western or N&H altered or modified the bulldozer by means of inadequate maintenance and care. The magistrate judge instructed the jury instead that it could apportion fault between Caterpillar, Great Western, N&H, and Brock if it found that any of those parties' conduct was a "substantial cause" of Brock's injuries. The magistrate judge submitted the following interrogatories to the jury, with the jury's responses:

Interrogatory 1: Are you satisfied from a preponderance of the evidence that at the time Caterpillar sold the D9H bulldozer in 1978, the braking system was in a defective condition that created such a risk of an accident of the general nature of the one in question that an ordinarily prudent company engaged in the manufacture of bulldozers, being fully aware of the risk, would not have put it on the market?

ANSWER: __X__ YES ____ NO

Interrogatory 2: Are you satisfied from a preponderance of the evidence that the defective condition was a substantial cause of the accident and the plaintiff's injuries?

ANSWER: __X__ YES ____ NO

Interrogatory 3: Are you satisfied from a preponderance of the evidence that Great Western Coal, Inc. failed to use ordinary care to properly inspect, maintain, and service the D9H bulldozer in question, and that such failure was a substantial cause of the accident and the Plaintiff's injuries?

ANSWER: __X__ YES ____ NO

Whether you have answered "Yes" or "No" to Interrogatory 3, you shall proceed to Interrogatory 4.

Interrogatory 4: Are you satisfied from a preponderance of the evidence that Nally & Hamilton failed to use ordinary care to provide a safe working environment for the Plaintiff, which in this action not only included inspection, maintenance, and service of the D9H bulldozer in question, but proper instruction and training regarding the use of the D9H bulldozer as well, and that such failure was a substantial cause of the accident and the Plaintiff's injuries?

ANSWER __X__ YES ____ NO

Whether you have answered "Yes" or "No" to Interrogatory 4, you shall proceed to Interrogatory 5.

Interrogatory 5: Are you satisfied from a preponderance of the evidence that the Plaintiff failed to use ordinary care for his own safety in the operation of the D9H bulldozer in question, and that such failure was a substantial cause of the accident and the Plaintiff's injuries?

ANSWER __X__ YES ____ NO

Whether you have answered "Yes" or "No" to Interrogatory 5, you shall proceed to Interrogatory 6.

The jury declined to award punitive damages but found compensatory damages of $950,000 and apportioned fault as

follows: 60% against Caterpillar, 20% against Great Western, and 15% against N&H. The jury also assigned 5% fault to plaintiff Brock. Accordingly, the magistrate entered a $570,000 judgment against Caterpillar.

Repeal by implication finds no favor within the courts. However, we conclude the two statutes may not be completely harmonized without doing violence or creating exceptions within either. *Ex parte Lawrence*, 204 Ky. 568, 265 S.W. 287 (1924); *City of Henderson v. Connell*, 156 Ky. 730, 161 S.W. 1121 (1914).

The development of comparative fault has impetuous by judicial fiat pronounced in *Hilen v. Hays*, Ky., 673 S.W.2d 713, 720 (1984). However, the comparative fault rule was initially determined inapplicable to products liability litigation. *Reda Pump Co.,a Div. of TRW, Inc. v. Finck*, Ky., 713 S.W.2d 818 (1986). However, at the following legislative session, the Kentucky legislature enacted the comparative fault statute, KRS 411.182 (effective July 15, 1988) and specifically drafted a provision to include products liability actions. *Ingersoll-Rand Co. v. Rice*, Ky.App., 775 S.W.2d 924 (1988). The proposed apportionment statute is adverse to the purpose of the products liability statute to such an extent that the apportionment statute negates the products liability statute enunciated in KRS 411.320(1).

The language of the comparative fault statute, KRS 411.182, is straightforward and admits, with ease, to only one construction: that in all tort actions, including products liability actions, fault is to be apportioned among all parties to each claim. The chosen language of the legislature is plain and direct rather that circumferential. The date of enactment and the legislative history intone negation of KRS 411.320(1).

Demonstratively, by implication, KRS 411.182(1) has repealed KRS 411.320(1), and this result exemplifies the concept of fundamental fairness enunciated in *Hilen v. Hays, supra*.

The law is so certified.

Stephens, C.J., Graves, Lambert, Reynolds, Stumbo, Wintersheimer, JJ., and Special Justice Edwin I. Baer sitting. All concur,.

Prior to his death on January 26, 1996, Justice Reynolds wrote the majority opinion herein. Rendition was delayed only by normal administrative procedures.

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NOS. 94-5077/78

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY W. BROCK,	)
	)
Plaintiff-Appellee Cross-Appellant,	)
	)
v.	)
	)
CATERPILLAR, INC.,	)**ORDER CERTIFYING**
	)**QUESTIONS OF LAW**
Defendant-Appellant Cross-Appellee,	)**TO THE SUPREME**
	)**COURT OF**
	)**KENTUCKY**
ROBERT WHITTAKER and OLD REPUBLIC INSURANCE COMPANY,	)
	)
Intervenors-Appellees.	)

BEFORE: **MERRITT**, Chief Judge; **KEITH** and **WELLFORD**, Circuit Judges

I. NATURE OF THE CASE

Defendant, Caterpillar, Inc. ("Caterpillar"), appeals from a jury verdict in favor of plaintiff, Gary W. Brock, finding Caterpillar partially liable for plaintiff's injuries. In this diversity case, the court finds that questions of Kentucky

law are dispositive of the cause and that there appears to be no controlling precedent in the decisions of the Kentucky Supreme Court or the Kentucky Court of Appeals. We, accordingly, certify a single question of law to the Kentucky Supreme Court pursuant to Kentucky Rule of Civil Procedure 76.37(1).

II. STATEMENT OF FACTS

Brock is a long-time bulldozer operator for Nally & Hamilton ("N&H"), a reclamation company doing work in coal mining areas in mountainous Harlan County, Kentucky. In June of 1990, plaintiff began work on a "high wall" where strip mining had taken place.[1] Brock normally operated a Caterpillar model D8L bulldozer but, on this particular day, N&H assigned him to a model D9H, which Caterpillar also manufactured in 1978. While Great Western Coal Company ("Great Western") owned this particular bulldozer, N&H borrowed it, on the day in question, because it was already located at the work site. In order to reach the top of the fill, Brock had to push dirt up an access road near the top of the mountain. The slope was approximately a two-to-one grade, an angle of about twenty-seven degrees. Brock testified that, as he proceeded up the access road, the bulldozer suddenly lost its prime or hydraulic fluid pressure, which caused the bulldozer to lose its breaking power on this slope. Brock attempted to slow the bulldozer's precipitate backward fall by dragging its blade and manually applying the brakes. As the bulldozer spun out of control, it left the access road, twisted

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[1]A "high wall" is the vertical wall that remains on a mountain slope after coal has been stripped away. A "fill" is the dirt that a reclamation company uses to return the mountain to its original contour after the coal has been removed. At the site in question, the fill had slipped at the top of the high wall and it was plaintiff's job to push the dirt back to the

sideways and tumbled down the reclaimed high wall, throwing Brock from the cab of the vehicle. Brock allegedly suffered various physical and mental injuries.

In 1991, Brock, a citizen of Kentucky, brought a timely diversity action against Caterpillar, an Illinois corporation, alleging that Caterpillar defectively designed the braking system on the D9H bulldozer and that the defective design made the product unreasonably dangerous. Brock further alleged that the defective design was the proximate cause of his injuries. After Brock filed his complaint, Old Republic Insurance Company (Old Republic), the worker's compensation carrier for N&H, intervened as a plaintiff, asserting a claim for recovery of the cost of medical attention and other benefits already dispersed to Brock. The Trustee for the worker's compensation Special Fund also intervened as a plaintiff, seeking the recovery of any benefits paid to Brock. The two intervening plaintiffs did not actively participate in the trial nor are they participating in this appeal. In addition, Caterpillar brought a third-party claim against Great Western, claiming that, if the accident occurred as Brock alleged, Great Western was responsible because it failed to observe routine care and maintenance of the bulldozer. The magistrate judge[2] dismissed Great Western on the basis of its post bankruptcy discharge and stay. The parties agreed, however, that, should the evidence warrant,

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[2]The parties agreed to trial of the case by Magistrate Judge James F. Cook.

Great Western would be included in the jury's apportionment of fault.[1]

Before trial, Caterpillar requested an instruction from the court advising the jury that if it found any other party performed an unauthorized alteration or modification of the D9H, it must return a verdict for Caterpillar. Furthermore, Caterpillar asked the magistrate judge to instruct the jury that an unauthorized alteration or modification includes the failure of the owner or operator to observe routine maintenance and care. The magistrate judge, however, declined to give Caterpillar's proffered instructions. He found that there was insufficient evidence for the jury to conclude that Great Western or N&H altered or modified the bulldozer by means of inadequate maintenance and care. The magistrate judge instructed the jury instead that it could apportion fault between Caterpillar, Great Western, N&H and Brock if it found that any of those parties' conduct was a "substantial cause" of Brock's injuries. The magistrate judge submitted the following interrogatories to the jury, with the jury's responses:

> Interrogatory 1: Are you satisfied from a preponderance of the evidence that at the time Caterpillar sold the D9H bulldozer in 1978, the braking system was in a defective condition that created such a risk of an accident of the general nature of the one in question that an ordinarily prudent company engaged in the manufacture of bulldozers, being fully aware of the risk, would not have put it on the

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[1]The magistrate judge also ordered Brock's employer, N&H, to be included in the jury's apportionment of fault.

market?

ANSWER: ✓ YES ___ NO

Interrogatory 2: Are you satisfied from a preponderance of the evidence that the defective condition was a substantial cause of the accident and the plaintiff's injuries?

ANSWER: ✓ YES ___ NO

Interrogatory 3: Are you satisfied from a preponderance of the evidence that Great Western Coal Inc. failed to use ordinary care to properly inspect, maintain, and service the D9H bulldozer in question, and that such failure was a substantial cause of the accident and the Plaintiff's injuries?

ANSWER: ✓ YES ___ NO

Whether you have answered "Yes" or "No" to Interrogatory 3, you shall proceed to Interrogatory 4.

Interrogatory 4: Are you satisfied from a preponderance of the evidence that Nally & Hamilton failed to use ordinary care to provide a safe working environment for the Plaintiff, which in this action not only included inspection, maintenance, and service of the D9H bulldozer in question, but proper instruction and training regarding the use of the D9H bulldozer as well, and that such failure

was a substantial cause of the accident and the Plaintiff's injuries?

ANSWER: ✓ YES ___ NO

Whether you have answered "Yes" or "No" to Interrogatory 4, you shall proceed to Interrogatory 5.

Interrogatory 5: Are you satisfied from a preponderance of the evidence that the Plaintiff failed to use ordinary care for his own safety in the operation of the D9H bulldozer in question, and that such failure was a substantial cause of the accident and the Plaintiff's injuries.

ANSWER: ✓ YES ___ NO

Whether you have answered "Yes" or "No" to Interrogatory 5, you shall proceed to Interrogatory 6.

The jury declined to award punitive damages but found compensatory damages of $950,000 and apportioned fault as follows: 60% against Caterpillar, 20% against Great Western, and 15% against N&H. The jury also assigned 5% fault to plaintiff Brock. Accordingly, the magistrate entered a $570,000 judgment against Caterpillar. Caterpillar filed a timely motion for judgment as a matter of law, or, in the alternative, for a new trial. After oral argument, the magistrate judge overruled Caterpillar's motion and this appeal followed.

Caterpillar contends that the jury's verdict was inconsistent and that it is entitled to a judgment as a matter of law. As interrogatories one and two indicate, the jury found that, in 1978 when Caterpillar sold the D9H bulldozer in question, the braking system was defective and that the defective condition was a substantial cause of Brock's injuries. Interrogatories three and four, however, indicate that the jury found that Great Western and N&H failed to use ordinary care by not properly inspecting, maintaining and servicing the bulldozer and that their individual failures were a substantial cause of the accident. Caterpillar maintains that the jury's findings that Great Western and N&H failed to properly inspect, maintain, and service the D9H bulldozer precluded, as a matter of law, finding that the bulldozer was defective. Caterpillar relies on section 411.320(1) of the Kentucky Product Liability Act, which states in pertinent part:

> (1) In any product liability action, a **manufacturer shall be liable for the personal injury**, death or property damage **that would have occurred if the product had been used in its original, unaltered and unmodified condition**. For the purpose of this section, product alteration or modification shall **include failure to observe routine care and maintenance**, but shall not include ordinary wear and tear . . .
>
> (2) In any product liability action, if the **plaintiff** performed an unauthorized alteration or an unauthorized modification, and such alteration or modification was a substantial cause of the occurrence that caused injury or damage to the plaintiff, the defendant shall not

> be liable whether or not said defendant was at fault or the product was defective.
>
> (3) In any product liability action, if the plaintiff failed to exercise ordinary care in the circumstances in his use of the product, and such failure was a substantial cause of the occurrence that caused injury or damage to the plaintiff, the defendant shall not be liable whether or not said defendant was at fault or the product was defective.

KY. REV. STAT. ANN. § 411.320 (emphasis added). Since the failure to observe routine care and maintenance of a product qualifies under this statute as an unauthorized alteration or modification of the product, Caterpillar argues that section 411.320(1) provides it a complete defense in this action.

Brock argues, on the other hand, that section 411.320(1) does not provide Caterpillar a complete defense because the subsequent enactment of Kentucky Revised Statute section 411.182, the Comparative Fault Act, repealed this earlier statute by implication. Section 411.182, enacted in 1988, states in pertinent part:

> (1) In all tort actions, **including products liability actions**, involving fault of more than one party to the action, **including third-party defendants**. . . the court, unless otherwise agreed by all parties, shall instruct the jury to answer interrogatories . . . [as to] (a) [t]he amount of damages each claimant would be entitled to recover if contributory fault is

> disregarded; and (b) [t]he percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, [and] third-party defendant.

KY. REV. STAT. ANN. § 411.182(1) (emphasis added). Section 411.182 became effective ten years after section 411.320(1). Thus, Brock contends that the enactment of the comparative fault statute evidenced the Kentucky legislature's intent to repeal section 411.320. In *Ingersoll-Rand Co. v. Rice*, 775 S.W.2d 924, 930 (Ky. Ct. App. 1988), the Kentucky Court of Appeals stated, in dicta, that section 41.182 overruled the contributory negligence defense in subsection (3) of section 411.320.[4] Relying on *Ingersoll-Rand*, Brock argues that the jury's findings do not immunize Caterpillar from liability under Kentucky law. No Kentucky court, however, has ever held that section 411.182 supersedes or invalidates subsection (1) of section 411.320.

The magistrate judge held that the verdict was not inconsistent, because there was insufficient evidence to support either an instruction or a finding that the bulldozer had been altered or modified. Yet, he concluded that there was sufficient evidence of negligence on the part of Great Western and N&H to submit interrogatories three and four to the jury. The jury found that Great Western and N&H failed to observe routine care and maintenance of the D9H bulldozer. Under section 411.320(1), these findings dictate a legal conclusion that the product was not defective. Because

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[4]The court of appeals held, however, that §411.182(1) did not apply retroactively and, therefore, the contributory negligence defense in § 411.320(3) still applied to a cause of action that accrued before the enactment of comparative fault in Kentucky. *Rice*, 775 S.W.2d at 930.

we find the jury's verdict inconsistent under Kentucky law, we must decide whether the Comparative Fault Act repealed by implication section 411.320(1) of the Kentucky Product Liability Act.

Before the enactment of the comparative fault statute, the Kentucky Supreme Court imposed comparative fault by judicial fiat. *Hilen v. Hays*, 673 S.W.2d 713, 720 (Ky. 1984). In 1986, however, the supreme court held that *Hilen's* comparative fault rule did not apply in a products liability action. *Reda Pump Co. v. Finck*, 713 S.W.2d 818, 820 (Ky. 1986). Shortly thereafter, the Kentucky legislature enacted the comparative fault statute and specifically drafted the provision to include products liability actions. *See Ingersoll-Rand Co.*, 775 S.W.2d at 930. Since section 411.182(1) states that comparative fault principles apply in products liability actions, plaintiff argues that the plain language of the Act evidences intend to abolish section 411.320 of the Kentucky Product Liability Act.

While Caterpillar concedes that the contributory negligence defenses in subsections (2) and (3) of section 411.320 were repealed by section 411.182(1), it argues that the adoption of comparative fault does not evidence legislative intent to repeal subsection (1). Caterpillar distinguishes *Ingersoll-Rand* on the grounds that the Kentucky Court of Appeals merely acknowledged that the comparative fault statute abolished the contributory negligence defenses in subsections (2) and (3). According to Caterpillar, unlike subsections (2) and (3), subsection (1) defines the basis of a defendant's liability for a defective product. Caterpillar argues that subsection (1) does not relieve the manufacturer of liability for a defective product because of the plaintiff's conduct; rather, it defines what a defective product is. Thus,

subsection (1) prevents the imposition of liability for an injury caused by a product whose defective condition cannot be attributed to the manufacture.

We can find no Kentucky law which directly resolves this issue. Consequently, we certify the following question of law to the Kentucky Supreme Court pursuant to Rule 76.37(1).

III. QUESTION OF LAW CERTIFIED

Did KY. REV. STAT. ANN. § 411.182(1) negate and/or overrule KY. REV. STAT. ANN. § 411.320(1)?

IV. THE NAME OF THE APPELLANTS AND APPELLEES

Defendant-Appellant Cross-Appellee	Caterpillar, Inc.
Plaintiff-Appellee Cross-Appellant	Gary W. Brock
Intervenors-Appellees	Robert Whitaker Old Republic Insurance Co.
Third-Party Defendants	Great Western Coal, Inc. Great Western Coal (Kentucky), Inc.

V. THE NAMES AND ADDRESS OF THE APPELLANT'S AND APPELLEES' COUNSEL

Counsel for Defendant-Appellant	Leslie W. Morris, II

Cross-Appellee, Caterpillar, Inc.	Stoll, Keenon & Park 201 East Main St. Suite 1000 Lexington, KY 40507 William F. Maready Robinson, Maready, Lawing & Comerford 380 Knollwood, Suite 300 Winston-Salem,NC 27103
Counsel for Plaintiff-Appellee Cross-Appellant, Gary W. Brock	Asa P. Gullett Gullett & Combs P.O. Box 1039 Hazard, KY 41702 Phyllis L. Robinson P.O. Box 952 Hyden, KY 41749

VI. DIRECTIONS TO THE CLERK

In accordance with Kentucky Rule of Civil Procedure 76.37, the Clerk of the United States Court of Appeals for the Sixth Circuit is hereby directed to serve copies of this certification order upon counsel for the parties and to file this certification order under the seals of this Court with the Kentucky Supreme Court along with the appropriate proof of service.

FOR THE COURT

/s/ Gilbert S. Merritt

GILBERT S. MERRITT, CHIEF JUDGE

PROOF OF SERVICE

True copies of the foregoing Certification Order were sent this 10th day of May, 1995, by ordinary United States Mail, to Leslie W. Morris, II, Stoll, Keenon & Park, 201 East Main Street, Suite 1000, Lexington, Kentucky 40507 and William F. Maready, Robinson, Maready, Lawing & Comerford, 380 Knollwood, Suite 300, Winston-Salem, North Carolina 27103, counsel for appellant; Asa P. Gullett, Gullett & Combs, P.O. Box 1039, Hazard, Kentucky 41702 and Phyllis L. Robinson, P.O. Box 952, Hyden, Kentucky 41749, counsel for appellee.

/s/ Leonard Green

Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

CIVIL ACTION NO. 91-160

GARY WAYNE BROCK PLAINTIFF,

VS. **MEMORANDUM OPINION AND ORDER**

CATERPILLAR, INC. DEFENDANT.

* * * * *

I. INTRODUCTION:

On September 16, 1993, judgment was entered in this action in favor of the Plaintiff against the Defendant. (Docket Entry [DE] #164).[1] On September 23, 1993, the Defendant filed a Motion for Judgment as a Matter of Law and, in the alternative, a New Trial. (DE #166). By this same motion, the Defendant asked for oral argument on the matter. (*Id.*). The Plaintiff filed his response to the Defendant's motion on October 12, 1993. (DE #171). On November 18, 1993, the Court granted the Defendant's request for oral argument, and scheduled this action for oral argument on November 30, 1993. (DE #181).

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[1]By the consent of the parties, this action has been referred by the Court pursuant to 28 U.S.C. § 636(c) to the Magistrate Judge for all purposes, including entry of judgment. (DE ##17-19).

Oral argument was held as scheduled.[2] Having considered the parties' arguments and papers, the Court now sets out its ruling on the Defendant's motion.

II. DISCUSSION:

A. The Defendant's motion for judgment:

1. Standard of review --

In federal diversity actions, a motion for judgment notwithstanding the verdict, which under the federal rules of procedure is now referred to as a motion for judgment as a matter of law, *see* Fed.R.Civ.P. 50(b), is governed by state law. *See J.C. Wyckoff & Ass. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1482 (6th Cir. 1991). Under Kentucky law, a trial court considering such a motion "is required to consider the evidence in the strongest possible light in favor of the party opposing the motion and must give the opposing party the advantage of every fair and reasonable inference that can be drawn from the evidence. *See Bank of Cumberland v. Aetna Cas. and Sur. Co.*, 956 F.2d 595, 597 (6th Cir. 1992) (*citing Taylor v. Kennedy*, 700 S.W.2d 415, 417 (Ky. Ct. App. 1985)). A trial court is precluded from entering judgment for the moving party "unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." *Taylor v. Kennedy*, 700 S.W.2d at 416 (citation

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[2]The Plaintiff was present in person, and by counsel Ms. Phyllis L. Robinson, Hyden, Kentucky, and Mr. Asa P. Gullett, Gullett, Combs & Branham, Hazard, Kentucky. The Defendant was present by counsel Mr. Leslie W. Morris, II, and Ms. Eileen O'Brien, Stoll, Keenon & Park, Lexington, Kentucky.

omitted). In making this decision, a trial court may not pass upon the credibility of witnesses or undertake to reconcile contradictory testimony. *See Peterman v. Darby*, 419 S.W.2d 747 (Ky. 1967).

2. Defendant's arguments --

(a) insufficient evidence to support liability --

The Defendant's main argument for judgment as a matter of law is that the Plaintiff failed to introduce sufficient evidence on which a jury could reasonably find that, at the time the D9H bulldozer was manufactured and sold in 1978, the braking system on the D9H bulldozer was in a defective condition that created such a risk of an accident of the general nature of the one in question that an ordinarily prudent company engaged in the manufacture of bulldozers, being fully aware of the risk, would not have put it on the market. In support of its argument, the Defendant relies on the presumption created by Kentucky Revised Statutes (KRS) § 411.310, and the holdings in *Ingersoll-Rand Co. v. Rice*, 775 S.W.2d 924 (Ky. Ct. App. 1989), which relies on language contained in Jones v. Hutchinson Manufacturing Company, 502 S.W.2d 66 (Ky. 1973), and Sexton v. Bell Helmets, Inc., 926 F.2d 331 (4th Cir. 1991).

Pursuant to KRS § 411.310, a produce is "presumed, until rebutted by a preponderance of the evidence to the contrary, . . . not defective if the injury . . . occurred either more than five (5) years after the date of sale to the first consumer or more than eight (8) years after the date of manufacture." KRS § 411.310(1). KRS § 411.310 further provides that a product is "presumed, until rebutted by a preponderance of the evidence to the contrary, . . . not

defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured." KRS § 411.310(2).

In *Ingersoll-Rand, supra*, the court held that the testimony of the Plaintiff's expert was insufficient to submit the case to the jury on the issue of strict liability. *Id.* at 938. The Court stated that, on remand, unless the Plaintiff "can present something more than a conclusion that it was theoretically probable that a different design would have been feasible and would have prevented his injuries, we are of the opinion that the issue of strict liability should not be submitted to the jury." *Id.* at 929. In reaching this holding, the court stated that the testimony of the Plaintiff's expert was "strikingly similar to that in *Jones v. Hutchinson Manufacturing Company*, Ky., 502 S.W.2d 66 (1973), in which an expert proposed a **post hoc** guard which might have prevented an injury." The court, quoting from *Jones, supra,* stated:

> "Proof of nothing more than that a particular injury would not have occurred had the product which caused the injury been designed differently is not sufficient to establish a breach of the manufacturer's or seller's duty as to the design of the product."

Id. at 928-29 (citation omitted).

Similarly, the Fourth Circuit Court of Appeals, construing Kentucky law, held in *Sexton, supra*, that the testimony of the Plaintiff's expert, Dr. Saczalski, was legally

insufficient on the issue of strict liability, and that the trial court had committed error in permitting the jury to consider such testimony. *Id.* at 338. In its opinion, the court, with regard to the nature of Dr. Saczalski's testimony, stated:

> Dr. Saczalski explained that technology existed to design a helmet that accommodated both higher and lower impact incidents. While no one in the industry had designed or manufactured such a helmet, Dr. Saczalski said he had built a prototype to show that it could be done.

Id. at 335. In holding that this type testimony was legally insufficient on the question of strict liability, the court stated that "proof that technology existed, which if implemented could feasibly have avoided a dangerous condition, does not alone establish a defect," *id.* at 336, and that in an industry manufactures a product in a manner that a plaintiff claims is required." *Id.* The court concluded by stating:

> [T]he fact that as of the time of trial Dr. Saczalski was able to develop a prototype using technology available to Bell in 1979[3] does not lead to the conclusion that the design of the Bell Star III helmet was defective. That an alternative design was "feasible" is at best hindsight. Looking back on the progression of technology, it is easy to fall into a mind-set of imposing current knowledge and expectations on older standards or expectations. But we

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[3]The helmet was manufactured in 1979. *Sexton*, *supra*, at 333.

> cannot, under the law, judge yesterday's design by contemporary standards or expectations. For this reason, Dr. Saczalski's testimony falls short of establishing a defect, *i.e.*, an imperfection measured against a then-existing standard or reasonable consumer expectation. We conclude, therefore, that his testimony should not have been considered by the jury in rendering a verdict in this case.

Id. at 338 (footnote added).

Based on this authority, the Defendant, in substance, argues, both in its papers and at oral argument, that the testimony of the Plaintiff's expert, William Cooper, was legally insufficient on the issue of strict liability because he merely stated that the accident in question cold have been prevented in the braking system on the D9H had been designed differently. (DE #170 at 2-5). The Plaintiff, both in his papers and at oral argument, responds that the cases cited by the Defendant are factually distinguishable from the facts in the present action. (DE #171). For the reasons that follow, the Court agrees with the Plaintiff.

As the court in Sexton, supra, noted, the presumption created by KRS § 411.310 does nothing more than retain the burden of proof on the ultimate question on the plaintiff, and therefore, its "utility" is questionable. *Id.* at 333. In other words, even if KRS § 411.310 did not exist, a plaintiff would retain the burden of proving by a preponderance of the evidence that the product was defective, and if the plaintiff failed to meet this burden, the court would direct a verdict in favor of the defendant. Therefore, the issue before this Court remains the same regardless of KRS § 411.310; that is,

whether the Plaintiff introduced evidence on which a jury could reasonably find by a preponderance of the evidence that, at the time the D9H bulldozer was manufactured and sold in 1978, the braking system on the D9H bulldozer was in a defective condition that created such a risk of an accident of the general nature of the one in question that an ordinarily product company engaged in the manufacture of bulldozers, being fully aware of the risk, would not have put it on the market.[4] *Id.*[5]

Considering the testimony of Mr. Cooper, the Court finds that it is materially different in substance from that offered by the plaintiffs' experts in *Ingersoll-Rand*, *supra*, *Jones, supra*, and *Sexton, supra*. Unlike *Ingersoll-Rand, supra*, where the plaintiff's expert testified "that it was theoretically probably that a different design would have been feasible and would have prevented [the plaintiff's] injury," *id.* at 929, *Jones, supra*, where "[t]he plaintiff's expert stated a post hoc conclusion that it was theoretically probable that a

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[4]In an action, such as this, which is based on the theory of the strict liability, the ultimate question is "whether the product creates 'such a risk' of an accident of the general nature of the one in question 'that an ordinarily prudent company engaged in the manufacture' of such a product ' would not have put it on the market.'" *Montgomery Elevator Co. v. McCullough*, 676 S.W.2d 776, 780 (Ky. 1984) (*quoting Nichols v. Union Underwear Co., Inc.*, 602 S.W.2d 429, 433 (Ky. 1980)).

[5]For purposes of the record, the Court notes that in this action, the evidence was that the D9H bulldozer was manufactured and sold in 1978, and that the injury occurred on June 20, 1990, some twelve years later. Therefore, pursuant to KRS section 411.310(1) the D9H is presumed to be "not defective." The evidence was further that at the time the D9H bulldozer was designed and manufactured in 1978 its design, methods of manufacture, and testing conformed to the generally prevailing standards or the state of the art in the industry. Therefore, pursuant to KRS section 411.310(2) the D9H is presumed to be "not defective." As stated, however, the Court finds that this "presumption" adds nothing to the burden carried by the Plaintiff on the ultimate issue.

different design would have been feasible and would have prevented the harm," *id.* at 70, and *Sexton, supra*, where the plaintiff's expert, "confined his opinion to the conclusions that the technology was available and Bell therefore "could" have addressed the risks of Sexton's accident," *id.* at 335 (emphasis in original), Mr. Cooper testified that the braking system about which he testified was, in fact, being used by the Defendant on another of its bulldozers in 1978. In other words, the Court finds that, unlike *Ingersoll-Rand, supra*, *Jones, supra*, and *Sexton, supra*, where the alternative design being proposed by the plaintiffs' experts was not being used by any manufacturers in the industry, see *Ingersoll-Rand, supra* at 929, *Jones, supra*, at 70-71, *Sexton, supra*, at 335, the alternative design testified to by Mr. Cooper was being used by the Defendant on another of its bulldozers, which was also designed and manufactured at the same time as the D9H in question.

Specifically, Mr. Cooper gave the following relevant testimony. He stated that the D9H bulldozer in question used a braking system that was assisted by hydraulic pressure. (DE #177 at 11, 12). Mr. Cooper testified that, if hydraulic pressure was lost for whatever reason, the "hydraulic boost system" on the brakes would also be lost, and that the only way to brake the bulldozer would be mechanically. (*Id.* at 13-14). Mr. Cooper testified that if a bulldozer was being operated on a rather flat area, and the hydraulic boost system to the brakes was lost, a bulldozer operator would be able to stop the bulldozer by using the mechanical brakes only. (*Id.* at 14).

On the other hand, Mr. Cooper testified that if a bulldozer such as the D9H was being used on a steep incline, and the hydraulic boost system to the brakes was lost, it would

not be possible for an operator to stop the bulldozer by using the mechanical brakes only. (*Id.* at 14, 16). In this regard, Mr. Cooper read from manuals produced by the Defendant regarding the proper preparation of the D9H for safe use on steep inclines. (*Id.* at 17-19). These manuals directed that in such application the oil level in the machine should be over-filled, and warned that "[i]ncorrect . . . oil level may cause the transmission pump on the track type tractors . . to cavitate when operating on steep slopes." (*Id.* at 17; *see id.* at 18).[6] Mr. Cooper gave the following explanation as to what was meant by "cavitate":

> To cavitate, that's what we talked about earlier, if you, instead of pulling oil, if you get it on a steep slope, the oil leaves the suction line, you pull air into it. That's essentially what that means.
>
> This can result in loss of pressure to operate [sic] steering clutches, to provide boost for brakes and to keep power shift transmission engaged.

(*Id.* at 17).

Mr. Cooper was then asked whether there was another way to design the braking system on a bulldozer so that it did not operate on hydraulic pressure, and he responded "Yes." (*Id.* at 18). Mr. Cooper testified that, rather than using a hydraulic braking system a "disk [sic] type brake system" could be used. Mr. Cooper testified that such a disc type

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[6]The reference to "track type tractors" means, in layman's terms, bulldozers of the type involved in this action.

braking system was being used by the Defendant in 1978 on another of its bulldozers, which is known as a D10. (*Id.* at 18-19). In this regard, Mr. Cooper stated:

> In 1978, the D10 tractor was a different design, and it had what is called the disk type brake system. And in this system you had to have, if you lost, if you shut the machine down, if you just did it in normal operation, you shut your machine off, would lose your hydraulic pressure. When you lost that hydraulic pressure, your brakes would lock up. It was just kind of a fail-safe device. When you started the machine back up and got the right amount of pressure, the brakes would disengage and you could operate the machine.

(*Id.* at 18-19).

Mr. Cooper testified that, upon his review of the evidence presented to him, it was his opinion that when the Plaintiff was operating the D9H bulldozer in question, "the pump pressure was lost, and as a result he lost his steering, he lost his boost to his brakes and he lost his transmission." (*Id.* at 19-20). After stating that bulldozers such as the D9H are used for the most part "in steep terrain," Mr. Cooper was asked whether he had an opinion "as to what effect if any the design of this bulldozer had on this accident?" Mr. Cooper responded as follows: "Yes, if the machine had had a fail-safe brake system, such as the new type tractor did, the D10 in '78 and the newer styled D9's did in I think '80 or '81, and therefore, if the machine had lost pressure it would have locked up and Mr. Brock wouldn't have gone down the hill." (*Id.* at 24).

In evaluating the Plaintiff's evidence, the jury could reasonably believe from the manuals produced by the Defendant relevant to the operation of the D9H that the D9H was intended for use on steep inclines. Similarly, from this manual, and based on the language therein that when operating on a steep incline the transmission fluid should be overfilled, the jury could reasonably believe that a foreseeable risk associated with operating the D9H on a steep incline was the hydraulic pressure may be lost. The manual further indicated that, if hydraulic pressure where lost at anytime, braking would become much more difficult. The question then becomes whether, in light of this foreseeable risk during an intended and foreseeable use, the braking system on the D9H was reasonably safe.

With regard to this issue, the Plaintiff's expert, Mr. Cooper, testified that in 1978 Caterpillar had available to it, and in fact was using on another model bulldozer, a braking system that would have alleviated the consequence of the foreseeable risk of loss of hydraulic pressure; that is, a braking system that would have not been impaired by the loss of hydraulic pressure, and, in fact, would have caused the bulldozer to automatically come to a halt in the event hydraulic pressure was lost. As Mr. Cooper testified that this alternative design was being used by the Defendant on another of its bulldozers at the time the D9H in question was manufactured and sold, the Court finds that the expert testimony in this action is materially different from that found insufficient in *Ingersoll-Rand, supra, Jones, supra*, and *Sexton, supra*.

Based on this evidence, the Court finds that the Plaintiff has presented sufficient probative evidence on which the jury could reasonably find that the braking system on the

D9H bulldozer was, at the time of its manufacture and sale, defective and unreasonably dangerous for its intended and foreseeable use. The Defendant's motion for judgment based on the assertion that there was insufficient evidence to support a finding of liability is OVERRULED.

(b) Insufficient evidence to support damages --

The Defendant argues that it is entitled to judgment as a matter of law on the Plaintiff's claim of damages for past medical expenses and future medical expenses for which the jury returned a verdict of $20,000.00 and $50,000.00 respectively. The Defendant argues that the undisputed evidence was that the Plaintiff's past medical expenses were $19,021.59, and that there was no evidence as to the amount of future medical expenses the Plaintiff would incur.

The Plaintiff responds by acknowledging that the evidence was to past medical was $19,021.59. As for his future medical expenses, the Plaintiff argues that testimony was given that his condition may be improved by a future surgical procedure, but acknowledges that no evidence regarding the dollar amount of such a procedure was introduced.

An award of damages must be reasonably supported by the evidence, and may not be based on speculation or sympathy. *See City of Ashland v. Smith*, 340 S.W.2d 208 (Ky. 1960); *Norfolk & Western Ry. Co. v. McCoy*, 61 S.W.2d 1080 (Ky. 1933). The Court orders that the judgment for past medical expenses shall be reduced from $20,000.00 to $19,021.59. The Court further orders that the judgment for future medical expenses shall be set aside on the ground that

there was no evidence on which the jury could reasonably conclude that the future surgical procedure would cost $50,000.00. This fact seems to be especially clear in light of the jury's note to the Court during its deliberations, wherein it asked, in substance, whether it could estimate the cost of the future surgical procedure.[7] Accordingly, the Defendant's motion for judgment on these items of damages shall be SUSTAINED.

(c) Other arguments for judgment --

The Court has given consideration to the Defendant's other arguments for judgment as a matter of law, and finds that they are without merit. The Court has reconsidered the evidence presented at trial, and finds that it provided a sufficient basis on which a jury could reasonably return the verdict which it did, both as to liability and damages. The Court further finds that the interests of justice and fairness do not require that further comment regarding these other arguments be made. Accordingly, the Defendant's motion for judgment based on these arguments is OVERRULED.

B. The Defendant's motion for new trial:

1. Standard of review --

In a federal diversity action, a motion for a new trial is governed by federal law. *See Arms v. State Farm Fire & Cas. Co.*, 731 F.2d 1245, 1248 n.2 (6th Cir. 1984). Under the federal standard, a trial court considering such a motion "must weigh the evidence, compare opposing proofs, and set

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[7]For the record, the Court, after consulting with counsel, answered "No."

aside the verdict if it is of the opinion that the verdict is against the clear weight of the evidence." *Woodbridge v. Dahlberg*, 954 F.2d 1231, 1234 (6th Cir. 1992) (citation omitted). "It should deny the motion if the verdict is one which could reasonably have been reached," *id.* (citation omitted), notwithstanding the fact that the court believes that another result is more reasonable. *TCP Industries, Inc. v. Uniroyal*, 661 F.2d 542, 546 (6th Cir. 1981). "The verdict is not unreasonable simply because different inferences and conclusions could have been drawn or because other results are more reasonable." *Woodbridge v. Dahlberg*, 954 F.2d at 1234 (citation omitted).

2. Defendant's arguments --

(a) Jury was improperly instructed/ inconsistent verdict --

The Defendant's main arguments involve the application of KRS § 411.320(1), which provides as follows:

> In any product liability action, a manufacturer shall be liable only for the personal injury, death or property damage that would have occurred if the product had been used in its original, unaltered and unmodified condition. For the purposes of this section, product alteration or modification shall include failure to observe routine care and maintenance, but shall not include ordinary wear and tear. This section shall apply to alterations or modifications made by any person or entity, except these made in

> accordance with specifications or instructions furnished by the manufacturer.

KRS § 41.320(1). First, the Defendant argues that the Court erred when it refused to instruct the jury that it should return a verdict for the Defendant if it found by a preponderance of the evidence that the D9H bulldozer had been altered or modified due to a failure by Great Western Coal, Inc. or Nally & Hamilton to observe routine care and maintenance. Second, the Defendant argues that the jury's verdict is inconsistent because of the one hand the jury found that the Defendant was partially at fault because the D9H bulldozer was defectively designed, but on the other hand found that Great Western Coal, Inc. and Nally & Hamilton were partially at fault for failing to inspect, maintain, and service the D9H bulldozer in question. The Defendant argues that pursuant to KRS § 411.320 the jury cannot making such a finding; that is, if the jury finds that Great Western Coal, Inc. or Nally & Hamilton failed to observe routine care and maintenance of the D9H in question, then it must return a verdict in favor of the Defendant against the Plaintiff.

The Plaintiff responds that the jury was properly instructed under the law of Kentucky. For the following reasons, the Court agrees with the Plaintiff.

During the trial, there was no evidence on which a jury could reasonably find that the D9H bulldozer in question had been altered or modified in any manner, whether it be from an alleged failure to observe routine care and maintenance or otherwise. What the evidence did show was the D9H bulldozer in question was owned by Great Western Coal, Inc., and that the Plaintiff was employed by Nally & Hamilton. The evidence further showed that the D9H bulldozer had been

loaned to Nally & Hamilton for the purpose of doing some reclamation work for Great Western Coal, Inc., and that it was in the course of the Plaintiff's employment with Nally & Hamilton that he came to operate the bulldozer in question. In this regard, the evidence showed that the D9H bulldozer was in the custody and control of both Great Western Coal, Inc. and Nally & Hamilton. From this fact, questions arose as to whether the D9H bulldozer in question had been properly inspected, maintained, and serviced for the purpose of being operated on a steep incline by Great Western Coal, Inc. and Nally & Hamilton, and whether Nally & Hamilton had provided the Plaintiff with a safe working environment, including the proper training and instruction for using the D9H bulldozer.

Based on this evidence, the Court concluded that there was no evidence on which a jury could reasonably find that the D9H in question had been altered or modified in any manner. Accordingly, the Court instructed the jury on the issue of the comparative fault of the Plaintiff, the Defendant, Great Western Coal, Inc., and Nally & Hamilton pursuant to KRS § 411.182, and not on the issue of alteration or modification based on failure to observe routine care and maintenance pursuant to KRS § 411.320(1). The Court finds that, based on the evidence, the jury was properly instructed, and that is verdict is not inconsistent. The Defendant's motion for a new trial on this argument is OVERRULED.

(b) Other arguments of improper instructions --

The Defendant makes other arguments that the Court erred when it refused to instruct the jury in more detail regarding various matters of law. The Court disagrees.

When a federal court sits in diversity, state law controls the substantive content of jury instructions. *See Gafford v. General Elec. Co.*, 997 F.2d 150, 166 (6th Cir. 1993). In drafting the substantive jury instructions, the Court was guided by the language of the Kentucky Supreme Court in *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991), wherein the court stated:

> Unlike the many jurisdictions that use pattern instructions, and otherwise explain the law of the case to the jury, the practice in Kentucky abjures the abstract and requires the trial court, applying (rather than stating) the underlying legal principles, to frame the dispositive issue.
>
> > "Our approach to instructions is that they should provide only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire."

Id. at 122 (citation omitted) (quotation marks in original). The court further noted in *Fulkerson, supra*, which was a products liability action based on a theory of strict liability, that they "caution against instructions getting into evidentiary matters, subquestions which better practice suggests should be omitted from the instructions and left to the lawyers to flesh out in closing arguments." *Id.* at 123. With particular reference to strict liability actions, the court, quoting from an earlier decision, stated:

> "Considerations such as feasibility of making

> a safer product, patency of the danger, warnings and instructions, subsequent maintenance and repair, misuse, and the products' inherently unsafe characteristics, while they have a bearing on the question as to whether the product was manufactured 'in a defective condition unreasonably dangerous,' are all factors bearing on the principal question rather than separate legal questions."

Id. at 123-24 (*quoting Montgomery Elevator Co. v. McCullough*, 676 S.W.2d 776, 780-81 (Ky. 1984)). The court concluded by stating:

> A trial court is well advised to leave consideration of these evidentiary factors to the arguments of counsel rather than attempting to frame them up in the instructions on the ultimate question. The language used may be confusing or misleading.

Id. at 124.

Based on these guiding principles of Kentucky law, the Court finds that it properly refused to further instruct the jury as requested by the Defendant on various principles of law. The Defendant's motion for a new trial based on the argument that the Court improperly instructed the jury is OVERRULED.

c. Other arguments in support of motion for new trial --

The Court has given consideration to the Defendant's

other arguments for a new trial. While the Court finds that all of the Defendant's other arguments are without merit, two deserve brief discussion.

One, the Court finds that it did not err in overruling the Defendant's motion in limine to exclude evidence regarding the D9L model bulldozer, which was manufactured and sold by the Defendant beginning in 1980 or 1981 as the successor to the D9H bulldozer in question. The Court found that the D9H and the D9L are substantially similar with regard to issues in this action, including the fact that their foreseeable use is reclamation work on steep inclines. The difference, of course, is that the D9L is equipped with a disc type braking system, while the D9H in question is equipped with a hydraulic braking system.

Under Kentucky law, the fact that the D9L was manufactured and sold beginning two years after the manufacture and sale of the D9H does not preclude introduction of such evidence. In commenting on what type of evidence a plaintiff would have to introduce in a products liability case based on the theory of strict liability, the Kentucky Supreme Court noted:

> In a products liability case the plaintiff must usually show that there was a defect in the way in which a product was designed or manufactured. Except where the defect is obvious . . ., the plaintiff must usually show that some alternative way of manufacture or design was both safer and feasible. A subsequent improvement is highly probative on both these points.

Ford Motor Co. v. Fulkerson, 812 S.W.2d 119, 126 (Ky. 1991) (quotation marks omitted) (citation omitted). The Kentucky Supreme Court held "that, as a general principle, evidence of design changes should be admissible where relevant in products cases." *Id.* at 126. In *Fulkerson, supra*, the issue was whether the spindle stem that had broken away from the spindle body on a 1984 Ford Ranger was defective. The Supreme Court of Kentucky held that the plaintiff in its case to prove the defect should have been permitted to have its expert testify to the fact that on the 1985 Ford Ranger the design of the spindle stem had been changed. The Kentucky Supreme Court stated that "proof that Ford actually did change its design in 1985 in a way to help keep spindle stems secure would be probative of the quality of the 1984 spindle design." *Id.* Based on this authority, the Court finds that the introduction of evidence regarding the different braking system on the D9L was proper. The Defendant was provided the opportunity to explain why the design change from the D9H to the D9L was made, and such evidence was properly submitted to the jury for its consideration in making a decision on the ultimate issue.

Similarly, the Court finds that it did not err in overruling the Defendant's objection to testimony regarding the disc type braking system on the D10 model bulldozer, which was designed, manufactured, and sold at the same time (i.e. 1978) as the D9H in question. Notwithstanding the fact that the D10 was twice as large as the D9H in question (i.e. 46 tons as compared to 90 plus tons), both machines were intended for reclamation work on steep inclines. The Court's ruling on this matter would have been different had there been evidence that the intended uses of these two bulldozers were substantially different (i.e. flat surface work as compared to reclamation work on steep inclines), or if the weight

difference had been between one machine weighing a few hundred pounds as compared to several tons, but such was not the evidence. As with the evidence relating to the D9L, the Defendant was provided the opportunity to explain why the D10 was designed with a disc type braking system and the D9H in question was not, and such evidence was properly submitted to the jury for its consideration in making a decision on the ultimate issue.

Two, the Court did not err in overruling the Defendant's motion to exclude Shelle Dietrich, a clinical psychologist, as an expert witness at the trial. Notwithstanding the fact that the Plaintiff did not list Ms. Dietrich as a witness until shortly before the trial, and after the deadline for doing so, the Defendant was aware of Ms. Dietrich's prior evaluation of the Plaintiff and her report based on that examination. Furthermore, the fact that Ms. Dietrich reevaluated the Plaintiff only several days before the trial is of little consequence as opinions based on this reevaluation were not materially changed from her initial opinions and report of which the Defendant had a copy. Based on these facts, the Court finds that the Defendant was not unduly prejudiced in its defense by Ms. Dietrich being permitted to testify at trial.

As to the Defendant's remaining arguments in support of its motion for a new trial, the Court has considered them, and finds them to be without merit. The Court further finds that the interests of justice and fairness do not require that further comment regarding these other arguments be made. Accordingly, the Defendant's motion for a new trial based on these arguments is OVERRULED.

III. CONCLUSION:

For the reasons previously stated,

IT IS ORDERED

(1) That the Defendant's motion for judgment as a matter of law shall be **SUSTAINED IN PART** and **OVERRULED IN PART** as follows:

(a) The motion is SUSTAINED to the extent it relates to the item of past medical expenses, and, accordingly, the judgment shall be reduced from $20,000.00 to $19,021.59.

(b) The motion is SUSTAINED to the extent it relates to the item of future medical expenses, and, accordingly, the judgment shall be vacated and set aside, and judgment shall be entered in favor of the Defendant on this item.

(c) The motion is OVERRULED in all other aspects

(2) That the Defendant's motion for a new trial is **OVERRULED**.

This the 8th day of December, 1993.

/s/ James F. Cook
James F. Cook, U.S. Magistrate Judge

DATE AND ENTRY AND DISTRIBUTION:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION
CIVIL ACTION NO. 91-160

GARY WAYNE BROCK, Plaintiff,	)	
OLD REPUBLIC INSURANCE COMPANY, Intervening Plaintiff,	)	
SPECIAL FUND Intervening Plaintiff,	)	
VS.	)	**JUDGMENT**
CATERPILLAR, INC., Defendant.	)	

* * * * *

In accordance with the Memorandum Opinion and Order filed on December 8, 1993, (Docket Entry [DE] #185), it is hereby

ORDERED AND ADJUDGED that the Plaintiff, Gary Wayne Brock, have and recover from the Defendant, Caterpillar, Inc., the sum of $539,412.95, along with the costs of this action, and that this judgment shall supersede the judgment of September 16, 1993. (DE #164).

This the 23rd day of December, 1993.

/s/ James F. Cook

James F. Cook, U.S. Magistrate Judge

DATE OF ENTRY AND DISTRIBUTION:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT LONDON

GARY WAYNE BROCK

JUDGMENT IN A CIVIL CASE

V.

CATERPILLAR, INC. CASE. NO. 91-160

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its Interrogatories.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff, Gary Wayne Brock, have and recover of the defendant, Caterpillar, Inc., the sum of Five Hundred Seventy Thousand Dollars ($570,000.00) and the costs of this action.

September 16, 1993
Date

Leslie G. Whitmer
Clerk

/s/ Shirley Denny
(By) Deputy Clerk